

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

ORIGINAL

77-4019

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL 259, UNITED AUTOMOBILE AEROSPACE
AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA,

Respondent.

BRIEF FOR INTERVENOR

CROSSIN and CROSSIN
Attorneys for Intervenor
65 Prospect Avenue
Larchmont, N. Y. 10538
(914) 834 5441

Of Counsel:

WILLIAM J. CROSSIN
WALTER J. KENNEY, JR.

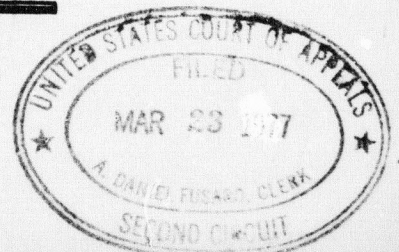


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ISSUES PRESENTED

1. Whether there is substantial evidence to support the Board's finding?
2. Whether the Board may have considered "Hearsay" evidence?

STATEMENT OF THE CASE

On May 7, 1975, a charge was filed by Anthony Dazzo ("Dazzo") alleging that local 259, United Automobile, Aerospace & Agricultural Implement Workers of America (hereinafter "Local 259" or the "Union") was in violation of Sections 8 (b) (1) (A) and 8 (b) (2) of the National Labor Relations Act.

On July 31, 1975, the Regional Director issued a complaint alleging that the Union, in violation of Section 8(b) (1) (B) of the Act, had put pressure on Mr. Dazzo's employer, thereby causing Mr. Dazzo to be discharged as General Service Manager of Atherton Cadillac, Inc. A hearing was held on December 9 and 10, 1975 before Administrative Law Judge Alvin Lieberman. Only the Union submitted a Post Hearing memorandum.*

Thereafter, on March 24, 1976 Judge Lieberman issued a decision dismissing the complaint against the Union. Both Dazzo and the General Counsel filed exceptions and supporting briefs. Respondent Union filed answering briefs. On that same day the matter was transferred to Washington pursuant to Section 102.45 of the NLRB rules and Regulations. On June 30, 1976 the Board issued a decision and order which was substantially the same as the Administrative Judges findings except the Board found a violation based on the facts from all of the evidence. The Union

*For some unknown reason, although requested to submit a brief at the close of the hearing General Counsel did not. Judge Lieberman had only the Unions brief to aid him in reaching a decision and adopted the Unions arguments with respect to several Key issues.

was ordered inter alia to compensate Dazzo by making him whole.

On January 14, 1977 the Board petitioned this court to enforce its order against the Union. On January 20, 1977 the Union answered and requested a dismissal.

On February 16, 1977 Dazzo moved to intervene and that motion was granted on February 23, 1977. Intervenor now submits this brief in support of the NLRBs application to enforce the Boards order.

STATEMENT OF FACTS

Intervenor ("Dazzo") was hired by Atherton Cadillac, Inc. ("Cadillac") in 1965, as a mechanic; in 1967 he was promoted to new car service manager; in 1969 he was promoted to night service manager and in 1972 he was promoted to general service manager. (71, 4-25)* As general service manager he supervised, disciplined, promoted, hired, fired, and adjusted the grievances of Cadillac's shop employees and reported directly to Cadillac's president, Richard C. Atherton, Sr. ("Atherton Sr.") (72, 24-81, 5)

In or about November 1974 Steve Elliot ("Elliot"), an employee of respondent, working closely with an organizing committee of Cadillac employees, Robert McDonald ("McDonald"), Edward Zegilla ("Zegilla") and Walter Sitler ("Sitler"), began to organize the service shop employees of Cadillac. (18, 8-19, 2) During the organizational period, Sitler told Dazzo that the respondent's organizing committee would eventually become respondent's negotiating committee in respect to bargaining a contract with Cadillac. (87, 1-8)

* References are to pages and lines in the transcript of the trial herein, held in Brooklyn, New York, on December 9th and 10th, 1975. The Appendix which is being filed by the NLRB was not made available to Intervenor. To the extent that references are made to portions of the record not included in the Appendix Intervenor will make those portions available to the Court.

In January 1975 Louis Salvatore ("Salvatore"), a paid union employee joined the union's organizing campaign. Subsequently, he took primary responsibility for negotiating a contract with Cadillac. (21, 20-22, 4) Salvatore was the union's recording secretary, and employed by the union to organize, negotiate contracts and represent its members. (166, 7-19)

On or about January 10, 1975 Dazzo laid off several employees including a member of the union's organizing committee (Zegilla). This was done at the instruction of Atherton, Sr. to dampen the ardor of the union to the service employees. (88, 6-89, 2)

On January 17, 1975, an election was conducted by the National Labor Relations Board which resulted in the union's being certified as the collective bargaining representative. Thereafter, the organizing committee of the union became the negotiating committee of the respondent and met with agents of Cadillac in order to negotiate a contract. (19, 4-11)

Despite the fact that Zegilla was laid off, and no longer an employee he remained the union's organizing committee, and also on its negotiating committee, (22, 16-20) and was at the Cadillac premises every single day, even after he was laid off. (38, 3-5)

On January 20, 1975, Salvatore and Elliot asked Dazzo to rehire the laid off employees. When Dazzo refused Salvatore said "this was a declaration of war".* (32, 1-20)

* Unless otherwise indicated, emphasis in any quotation is added.

On January 21, 1975, Salvatore told Atherton Sr.:

"Dazzo is creating trouble in the shop". (35, 8-19)

On January 22, 1975, Elliot had a meeting with the employees of Cadillac in order to discuss contract proposals. At this meeting the employees were very upset and calling Dazzo "most every name under the sun" (57, 2-58, 15) and Elliot knew that they wanted him to go because of "the language they used in describing him". (65, 2-14)*

Similarly, Zegilla believed that it was a "general feeling amongst the men" that they wanted as much money as they could get as long as Dazzo was there. (220, 4-21)

On January 30, 1975, a slowdown was initiated by McDonald, a member of the organizing committee and bargaining committee. This work stoppage, or slowdown, was initiated because McDonald claims that he observed one customer being refused service by a Cadillac service writer when two or three Cadillac mechanics were idle. Then, McDonald told the Cadillac employees that Dazzo was turning away work. (185, 22-186, 21; 194, 21-195, 13) The next day Atherton Jr. asked for an explanation and McDonald replied "the problem is Dazzo. Lighten Dazzo up, he is harrassing and threatening the men.**

* When Elliot was asked if the employees asked him to bring up Dazzo's status in the negotiations, Elliot replied: "No, No, I don't recall. I don't recall. Possibly, I don't recall". (58, 12-15)

** Zegilla added that Atherton Jr. then asked "Does anybody have any suggestions as to who would make a good service manager?" and "at that point Bob McDonald recommended Ernie Barter for the job". (213, 20-24) Ernie Barter became the service manager after Dazzo was terminated. (202, 8-14)

On January 31, 1975, Elliot took a strike vote of the Cadillac employees, and distributed strike signs to McDonald outside of the Cadillac building. (39, 7-9; 40, 4-7)

On February 3, 1975, respondent first submitted its written contract proposals to Cadillac and refused to modify its proposals. (41, 11-19)

The union was aware of the slowdown and the remarks about Dazzo but took no action against McDonald - not even a verbal reprimand. (42, 19-43, 22)

Atherton Sr. protested Zegilla's presence at the February 3rd negotiating meeting because Zegilla was not employed by Cadillac. (42, 7-15) However, Zegilla was rehired by Cadillac in time for the negotiating meeting on February 11, 1975. (223, 4-7) Dazzo testified that he did not rehire Zegilla, but was told by Atherton Sr. that he "just received a call, Mr. Zegilla will be back to work Thursday". (99, 6-21)

The next negotiating meeting was held on February 11, 1975. (44, 16-18) At either the February 3rd or 11th meeting, Elliot testified that Salvatore told Atherton Sr.:

"Your manager (Dazzo) is making things tough, harrassing the committee, this is why the men are not being flexible, and why they want the contract terms that have been proposed"
(62, 20-63, 13)

On February 11, 1975, Dazzo reported to work, and at about 10:30 a.m., he observed Elliot and Salvatore talking to McDonald in the service area of Cadillac. After that, he saw Elliot and Salvatore walk into the office of Atherton Sr. Shortly after 11:00a.m. Dazzo was called into Atherton Sr.'s office. Atherton Sr. was alone. He told Dazzo to come in and close the door and sit down. Then, Dazzo testified:

"He (Atherton Sr.) said union agents left his office after a shouting match, and they demanded that I (Dazzo) be terminated. They wouldn't negotiate a contract and that they had strike signs in the car and that if I wasn't off the premises that day that they would strike."

When Dazzo protested and said he was with him for ten years, Atherton said there's nothing he could do about it; he couldn't afford a strike at this time. (90, 22-101, 20)

When Dazzo left Atherton Sr.'s office he saw Elliot, Sitler, Salvatore and Zegilla in the parts and service area of Cadillac. Sitler spoke to Dazzo and said he was sorry that it happened, that he had opposed it, but there was nothing he could do; that he was sorry. (101, 24-102, 20)

Thereafter, Atherton Sr. signed and sent Dazzo the following letter on Cadillac stationery. (General Counsel's Exhibit No. 3; 105, 3-110, 7)

February 14, 1975

To Whom It May Concern:

This is to inform you that Anthony Dazzo was dismissed from the firm of Atherton Cadillac, Inc. on February 11, 1975.

Mr. Dazzo had been in our employment since 1965, and rose to the position of General Manager. During this time his work was beyond question and exemplary.

Unfortunately, a Union dispute arose and to avoid a strike, Mr. Dazzo became the focal point of the dispute that made it necessary to relieve Mr. Dazzo of his duties.

I recommend him highly to any future employer.

Yours very truly,
Atherton Cadillac, Inc.
/s/ Richard C. Atherton,
President

RCA:ss

Elliot testified that the union negotiating committee was informed of Dazzo's discharge by Atherton Sr. (61, 3-9). * and that when respondent's agents reported the progress of the negotiations to the men, "they were thrilled to death when they heard Tony got the axe". (61, 21-25)

Zegilla stated that Dazzo's termination was a "large event in the contract negotiations, not easily forgettable". He thought it more important than obtaining a holiday. (218, 17-18)

Sitler testified that, throughout the negotiations and prior to Dazzo's termination, he had knowledge and there was talk among the bargaining committee and employees, that Dazzo might be terminated. (162, 4-25) Dazzo testified that Sitler admitted to him that Sitler was aware that Dazzo was going to be terminated a week before it happened, but when Sitler raised his opposition,

* Respondent's other agents, Salvatore (170, 21-25), McDonald (189, 22-23), Zegilla (214, 13-15) testified that they were informed of this fact by Stone.

he was told by the other members of the bargaining committee to shut up and don't make waves, that they know what's best for the shop. (111, 10-24).

Elliot and Salvatore testified that the employees considered Dazzo to be their biggest problem and after he was terminated they were instructed to lower their demands and settle the contract. Thereafter respondent modified its demands and an agreement was reached on March 3rd. after the strike date set by the union of March 1 (47, 24-48, 13; 171, 16-23) Subsequent to February 11th, there were negotiating meetings on February 20th, February 25th, February 27th and March 3rd. (173, 23-174, 1)

After Dazzo was terminated, he was unable to get a job and he sent out about 85 resumes. One of them was in response to an ad in the paper which listed a post office box for a return address. (132, 1-15) The ad, in October 1975, was for Dazzo's former position with Cadillac. (131, 15-23)

Following the mailing of the resume, Dazzo testified that he received a call from an employee of Cadillac, who inquired if Dazzo was coming back. Then, Dazzo called Atherton Sr. and asked for the job. Atherton Sr. replied that he would let Dazzo know after he spoke to the unions agents. Atherton said that he had a dinner date set with them and Dazzo should call again after it took place. When Dazzo called again, Atherton told him that he had not received an answer from the union but Dazzo could have his job back if he dropped his case against the union. (134, 13-137, 19)

POINT I

THE DECISION OF THE NLRB FINDING
A VIOLATION OF SECTION 8(b)(1)(B)
OF THE NATIONAL LABOR RELATIONS
ACT WAS FOUNDED ON SUBSTANTIAL
EVIDENCE

The question before this court is whether or not the court should enforce the order of the NLRB dated June 30, 1976, in which the Board found that Respondent was guilty of a violation of 8(b)(1)(B) of the Act which provides in pertinent part:

"It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce ... (B) an employer in the selection of his representatives for the adjustment of grievance."

The crux of an 8(b)(1)(B) violation is a strike or other coercive action which has as one of its objectives the removal of a supervisor. The type of conduct sought to be prohibited is actual or threatened interference with the employer's business by the union unless the employer accedes to the union's demand to remove the supervisor. Longshoremen (ILA) (Westchester Marine Shipping Co.), 219 NLRB 9 (1975); Sheet Metal Worker's International Association, Local Union No. 17, AFL-CIO (George Koch Sons, Inc.), 199 NLRB 166 (1972); Communications Workers, Local 2550, (American Tel. & Tel. Co.), 195 NLRB 945 (1972); Laborers, Local 423 (Mansfield Flooring Co.), 195 NLRB 241 (1972). In fact, the principal sponsor of the Act, Senator Taft, made it clear that action such as the union indulged in here was

strictly forbidden by this section of the Act.

"In the Senate Report No. 105 on S. 1126 in explaining Section 8(b)(1)(B), it was stated:

...also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances.

In the Congressional Record of April 23, 1974, page 3953, Senator Taft in explaining this section said "... employees can not say to their employer, 'We do not like Mr. X. We will not meet Mr. X. You have to send us Mr. Y.'" That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work.'"

On April 28, 1947, Senator Ellender (p. 4266 in the Congressional Record) spoke in support of the legislation as follows:

I shall now deal briefly with strikes invading the prerogatives of management ... The Bill, in subsection 8(b)(1) on page 14, makes it an unfair labor practice for a union to attempt to coerce an employer either in the selection of his bargaining representatives or in the selection of a personnel director or foreman or other supervisory officials. Senators who heard me discuss the issue early in the afternoon will recall that quite a few unions forced employers to change foreman. They have been taking it upon themselves to say that management should not appoint any representative who is too strict with the membership of the Union. This amendment seeks to describe a remedy in order to prevent such interference."

Both the Board and the Administrative Judge are in basic agreement on the facts, they differ however on the inferences and conclusions to be drawn therefrom. The fact that they, the Board and the Administrative Judge differed is not uncommon. Where this occurs, no special weight is to be given to the examiners, findings NLRB v. Lenkurt Electric Co. 438 F.2d 1102, 1105 (9th Cir 1971); Hawkins v. NLRB, 358 F.2d 281 (7th Cir 1966); Chewey California Lumber Co. v. NLRB, 319 F.2d 375, 377 (9th Cir 1963). Stated another way, the Court should not make a de novo factual finding or substitute its opinion for that of the Board. NLRB v. Custom Chair 422 F. 2d 1300 (9th Cir 1970). The question before the court is: "Is there substantial evidence to support the Boards findings?" NLRB v. Local 3, Electrical Union, 477 F.2d 260 cert den 414 U.S. 1065 (2d cir 1973); NLRB v. Bausch and Lomb Inc. 526 F.2d 817 (2d cir 1975); NLRB v. Theasure La Ke, Inc., 453 F.2d 202 (3d Cir 1971).

The following facts, not only are sufficient to support the Boards decision, but indicates that the Board had before it an overwhelming amount of evidence demonstrating a violation of the Act by the Union:

Early January 10 -- Dazzo laid off Zegilla and five or six other employees, (88, 6-89,2)*

* Indicates that both the Administrative Law Judge and the Board substantially included these facts in their findings. There are additional facts in the record which further supports the Board's conclusion which will be covered under Point II.

January 17 -- Dazzo had a dispute with Zegilla and Salvatore (95, 4-24; 26, 6-27, 10);

January 20th- After another argument, Salvatore declares war on Dazzo (32, 1-20);*

January 21st- Salvatore tells Atherton Sr. that Dazzo is causing trouble (35, 8-19);*

January 22nd- Elliot and Zegilla know from a meeting of the employees, that they don't like Dazzo and want him to go. (65, 2-14; 220, 4-21);

January 30th- McDonald causes a work stoppage to protest Dazzo. Atherton Jr. asked why the men stopped work. McDonald replied that it was because of Dazzo, and recommended a replacement for Dazzo. (44, 3-16; 42, 19-43, 22); (185, 22-186, 21);*

January 31st- Elliot took a strike vote of the Cadillac employees and distributed strike signs to McDonald. (39, 7-9; 40, 4-7);

Feb. 3rd or 11th- Salvatore tells Atherton Sr. that the respondent proposed the contracts that it did, and is being inflexible, because of Dazzo. (62, 20-63, 13).*

February 11th-Atherton Sr. fires Dazzo and tells him that he did so because respondent demanded it in order to negotiate a contract. (99, 22-101, 20);*

Zegilla says Dazzo's termination was a large event in the contract negotiations. (218, 17-22);

Elliot says the men were thrilled to death when they heard Dazzo got the axe. (61, 21-25);

Salvatore and Elliot said because Dazzo was fired, they were told by the employees to reduce their demands. (47, 24-48, 13; 171, 16-23).*

* Indicates that both the Administrative Law Judge and the Board substantially included these facts in their findings. There are additional facts in the record which further supports the Board's conclusion which will be covered under Point II.

February 27th-Union demands substantially lowered-
union agrees to work past strike deadline
(47, 24-48, 13).*

March 3rd -- Contract is signed with reduced demands
accepted (48, 14-16).*

These facts demonstrate and the Board so found that the "(Unions) message to fire Dazzo and its hostility toward Dazzo was repeatedly communicated to the Employer." And that "the employer discharged Dazzo only after it was clear that the bargaining was hopelessly stymied". (Decision of the Board June 30, 1976 p. 6). In short the employer was forced by the Union to fire Dazzo. This finding by the Board is more than supported by substantial evidence but by an overwhelming amount of evidence. Consequently the Board's order should be enforced. NLRB v. Bausch and Lomb, Inc., 526 F.2d 817 (2d Cir 1975). This would be true even if the Court might have reached a different conclusion itself. NLRB v. Local Union No. 3 IBEW, AFL-CIO 477 F.2d 260 (2d Cir 1973) cert den 414 U.S. 1065.

* Indicates that both the Administrative Law Judge and the Board substantially included these facts in their findings. There are additional facts in the record which further supports the Board's conclusion which will be covered under Point II.

POINT II

ADDITIONAL EVIDENCE IN THE RECORD FURTHER CORROBORATES THE BOARD'S FINDING OF A VIOLATION OF THE ACT

In addition to the facts specifically referred to by the Board in its decision and order, there is other evidence contained in the record which further substantiates the Board's findings. Since this Court must look to the record as a whole, to determine if there is substantial evidence to support the Board's finding of facts, NLRE v. Bausch and Lomb, supra, it is pertinent to relate these facts.

The Board supported its conclusion that the union violated Section 8(b)(1)(B) of the Act on circumstantial evidence it is submitted that there is in addition direct evidence which would further buttress this conclusion.

Walter Sitler was a member of the bargaining committee at Cadillac and was called as a witness by the union. Prior to his testimony Dazzo testified that after he was fired he spoke with Sitler who told him he was sorry ... but there was nothing he could do. (102,7-10) Sitler testified that Dazzo's possible termination was discussed by the bargaining committee and it was discussed throughout the negotiations and that he knew of Dazzo's possible termination before it occurred. (162) He further stated that there was trouble in the shop because of Dazzo (163, 23-25). In addition to these statements, both Salvatore and Elliot, who were paid by the Union were members

of this committee. Elliot's testimony is consistent with Sitler's and acknowledge that he knew the employees wanted Dazzo to go because of the language they used (65, 2-14) and Zegilla who was not an employee but nevertheless remained on this committee indicated that as long as Dazzo was there they were seeking as much money as possible (220, 4-21). In short all of this testimony (non-hearsay) demonstrates and corroborates what Atherton Sr. said in his letter of recommendation. "Unfortunately, a union dispute arose and to avoid a strike, Mr. Dazzo became a focal point of the dispute that made it necessary to relieve Mr. Dazzo of his duties." So in addition to the circumstantial evidence there is direct evidence tending to show that a threat was communicated to Cadillac and Cadillac rejected it and fired Dazzo, its negotiator. Paddock Pools, 120 NLRD 249 (1958); ILGWU (Slate Belt), 122 NLRB 1390 (1959); Local 294, IBT (K-C Refrigeration Transport Co., Inc.), 126 NLRB 1 (1960).

POINT III

DAZZO'S LETTER OF RECOMMENDATION
COULD HAVE BEEN PROPERLY CONSIDERED
BY THE BOARD

Although the letter of recommendation was not considered by the Board, the Board could have properly considered it. The letter was written shortly after his discharge and (G.C. ex 3) provided as follows:

February 14, 1975

To Whom It May Concern:

This is to inform you that Anthony Dazzo was dismissed from the firm of Atherton Cadillac, Inc. on February 11, 1975.

Mr. Dazzo had been in our employment since 1965, and rose to the position of General Service Manager. During this time his work was beyond question and exemplary.

Unfortunately, a Union dispute arose and to avoid a strike, Mr. Dazzo became the focal point of the dispute that made it necessary to relieve Mr. Dazzo of his duties.

I recommend him highly to any future employer.

Yours very truly,

Atherton Cadillac, Inc.

S/ Richard C. Atherton
President

The Administrative Law Judge refused to consider it because it was hearsay and the Board agreed with this conclusion.

(Decision p. 5). Dazzo submits that the letter could have properly been considered under either of two theoris: 1) Atherton is in effect a party - opponent of 2) As a present sense impression or

an existing emotional condition. The Federal Rules of evidence Rule 801 provides as follows:

- (d) Statements which are not hearsay. A statement is not hearsay if. . .
- 2) Admission by party-opponent. The statement is offered against a party and is. . . (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Atherton Sr. was not named as a party in this court because the Boards' order is directed at the Union. In reality, however, he occupies the same position as the Union. He was the instrument through which the prohibited act was accomplished and in a sense is a co-conspirator with the Union.

However, even if the Court does not view him in this posture the statement is still admissible either as a present sense impression or to show his state of mind. Remember the complaint alleged and the Board found that the Union coerced Atherton into firing Dazzo. Certainly the letter is evidence of his succumbing to the coercion. Rule 803 of the Federal Rules of Evidence provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- 1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. . . .

- 3) Then existing, mental, emotional or physical condition.
A statement of the declarants then existing state of mind. . . (such as intent, plan motive, design, mental feeling, pain and bodily health).

Either one of the two exceptions are pertinent here because the letter was written shortly after the discharge of Dazzo and reflects Athertons impression of the events that took place and it certainly demonstrates his state of mind at that time i.e. he had to fire Dazzo because of pressure. See e.g. Monroe v. Board of Ed. of Town of Walcott, Conn. 65 FRD 641 (D.C. Conn. 1975).

Conclusion

The Board's application for enforcement of its order should be granted because the Boards' decision is supported by an overwhelming preponderance of credible evidence.

Dated: March 18, 1977

Respectfully Submitted,
Crossin and Crossin
Attorneys for Intervenor
65 Prospect Avenue
Larchmont, N. Y. 10538
(914) 834-5441

Of Counsel:

William J Crossin
Walter J. Kenney, Jr.

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

LOCAL 259, UNITED AUTOMOBILE
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA,

Respondent

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Docket No. 77-4019
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X

Robert L. Ford
agent for Crossin & Crossin
Intervenor

for the above named Intervenor herein. That he is over 21 years of age, is not a party to the action and resides at 755 Hancock Street, Brooklyn, NY

That on the 18th day of March, 1977, he served the within
Intervenor's Brief

upon the attorneys for the parties and at the addresses as specified below

Elliott Moore, Esq.
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

Hon. Samuel M. Kaynard
Director, Region 29
National Labor Relations Board
16 Court Street, 4th Floor
Brooklyn, New York 11241

Richard Dorn, Esq.
Speiser, Weinstock, Harper
Dorn & Leibowitz
380 Madison Avenue
New York, New York 10017

by depositing two copies to each
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-
tained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,
that being the addresses within the state designated by them for that purpose, or the places
where they then kept offices between which places there then was and now is a regular com-
munication by mail.

Sworn to before me, this 18th
day of March, 1977

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4102705
Qualified in Delaware County
Commission Expires March 30, 1977

Robert G. Ford